

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

MARK LENZI,

Plaintiff,

v.

**UNITED STATES DEPARTMENT OF
STATE,**

Defendant.

.....

:
:
: Civil Action
: No. 1:21-cv-01371-PTG-IDD
:
:
: January 5, 2023
: 10:23 a.m.
:
:
:
:
:
:
:

**TRANSCRIPT OF MOTION HEARING PROCEEDINGS
BEFORE THE HONORABLE PATRICIA TOLLIVER GILES,
UNITED STATES DISTRICT COURT JUDGE**

APPEARANCES:

For the Plaintiff:

STEPTOE & JOHNSON LLP (DC)
Steven Kaplan, Esq.
1330 Connecticut Avenue, NW
Washington, DC 20036
202-429-3000
Fax: 202-429-3015
Email: Skaplan@steptoe.com

STEPTOE & JOHNSON LLP (DC)
Christopher Alan Suarez, Esq.
1330 Connecticut Avenue, NW
Washington, DC 20036
202-429-8131
Email: Csuarez@steptoe.com

For the Defendant:

UNITED STATES ATTORNEY'S OFFICE
(Alexandria)
Matthew J. Mezger, Trial Attorney
Catherine Yang, Trial Attorney
2100 Jamieson Avenue
Alexandria, VA 22314
703-299-3700
Email: Matthew.mezger@usdoj.gov

APPEARANCES: (Cont.)

Court Reporter:

Scott L. Wallace, RDR, RMR, CRR
Official Court Reporter
United States District Court
401 Courthouse Square
Alexandria, VA 22314-5798
Office: 703.549.4626
Cell: 202.277.3739
Email: Scottwallace.edva@gmail.com

Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

MORNING SESSION, JANUARY 5, 2023

(10:23 a.m.)

THE COURTROOM CLERK: Civil Action Number 1:21-cv-1371,
Lenzi versus the Department of State, et al.

Counsel, please note your appearances for the record.

MR. SUAREZ: Good morning. This is Christopher Suarez
from Steptoe & Johnson on behalf of Plaintiff Mark Lenzi. With
me is Mr. Kaplan, also of Steptoe & Johnson.

THE COURT: Thank you. Good morning.

MR. METZGER: Good morning, Your Honor. Attorney Matthew
Metzger on behalf of defendants, and with me is --

THE COURT REPORTER: I'm sorry, I didn't understand you.

MR. METZGER: I apologize. I'm joined by Ms. Catherine
Yang, trial attorney from the Department of Justice who is
arguing before the Court this morning.

THE COURT: Good morning. Ms. Yang, I'll hear from you
first.

MS. YANG: Thank you, Your Honor. Good morning.

THE COURT: Good morning.

MS. YANG: The issue before the Court on this motion is
whether plaintiff has fully and properly exhausted his claims
about an assignment, Frankfurt in 2021. We think the plaintiff
very clearly has not.

As Your Honor knows, exhaustion requires more than just
initial claims concerning an administrative claim. It requires

1 the plaintiff to see the claim through to conclusion, meaning the
2 employee has to continue to pursue the claim throughout the
3 entire history, and then, if they choose to bring a lawsuit, has
4 to timely bring claims in that federal case, too.

5 None of that happened here. When the EEO office did not
6 accept the 2021 Frankfurt claim for investigation, the plaintiff
7 never responded to be accepted. He responded on other claims,
8 but he did not pursue the Frankfurt claims, and as a result those
9 claims were never investigated --

10 THE COURT: This is our third motion to dismiss in this
11 case.

12 MS. YANG: Yes.

13 THE COURT: And so we've already -- we have just issues of
14 exhaustion previously, not with respect to this Frankfurt 2021
15 claim but with respect to other claims, and so my first question
16 is: How many of these allegations and amended allegation letters
17 do we have from the Department of State? Are there three?

18 MS. YANG: There were two following the EEO complaints.
19 They have over time been amended, and so there have been a couple
20 of different iterations of the acceptance letters.

21 I believe we have three acceptance letters that pertain to
22 the EEO claims in 2021, and I think there were two or maybe three
23 acceptance letters for the 2020 EEO claims.

24 THE COURT: Okay. So I don't have, the Court doesn't have
25 all of the acceptance letters before me because in your prior

1 motions to dismiss where you made arguments with regards to
2 exhaustion, the government relied on not only the letter, the
3 prior acceptance letters and attached some of those, but also the
4 plaintiff's original EEO complaint.

5 MS. YANG: Yes.

6 THE COURT: So you argued both. So, you know -- because
7 when I looked at the letters that were attached to prior motions,
8 for instance, I didn't see the Frankfurt -- the 2019 Frankfurt
9 position referenced in those acceptance letters also, unless they
10 were in another letter that the Court was not provided.

11 MS. YANG: I believe the Frankfurt assignment or the
12 Frankfurt claims from 2019 were included in our previous
13 acceptance letter. I believe that letter is before the Court,
14 although I don't have -- I confess I don't have the previous
15 pleadings with me.

16 THE COURT: Right, because I pulled the earlier pleadings,
17 I think, from your first motion to dismiss, and so maybe this
18 isn't the first letter, but it did not reference that prior
19 Frankfurt. But still to that point, in challenging whether or
20 not plaintiff sufficiently and properly exhausted claims, the
21 government did also look to their EEO complaint. And I get what
22 you are saying. I appreciate what you're saying, because not
23 only do we have the issue of the letter from the Department of
24 State where there was not a correction, we also have had -- this
25 is potentially our third complaint: The original, and then we

1 had a first amended, and then this is the second amended. So I
2 get your point, but still, it seems like in prior motions the
3 government didn't provide those.

4 MS. YANG: That's true, Your Honor, and the reason for
5 that is because there are two related but separate aspects of
6 exhaustion. One aspect of exhaustion is the very traditional,
7 did the complainant bring the complaint at all in the
8 administrative charge? And if the answer is no, that, you know,
9 the result from that is very straightforward. And so that was
10 the exhaustion that we looked to and previously discussed,
11 failures to promote, failure to accommodate, because those things
12 have never been brought at all. So that's one aspect of
13 exhaustion.

14 The aspect of exhaustion that we're dealing with today on
15 today's motion is not whether someone has brought the claim
16 initially, but whether they have seen that claim through to
17 completion in the administrative review. That's different, but
18 it is an established body of law within the Fourth Circuit: The
19 *Austin* case is the Fourth Circuit decision, and the --

20 THE COURT: But it didn't involve merely correcting an
21 acceptance letter.

22 MS. YANG: It's true that the Fourth Circuit case did not
23 involve those exact facts, although the teaching from the Fourth
24 Circuit authority is very clear that the claimant has to complete
25 the administrative proceeding through completion for whatever

1 claims they're trying to bring, but we did also cite other cases
2 from outside of this circuit that very specifically deal with the
3 facts of addressing -- of making sure that all the claims that
4 the claimant wants to bring in this case are presented in the EEO
5 letter.

6 THE COURT: But as you said, those cases are not Fourth
7 Circuit cases.

8 MS. YANG: That is true.

9 THE COURT: And not all courts have gone that way,
10 correct?

11 MS. YANG: I'm sure that is also true, but, again, I think
12 the teaching from the Fourth Circuit case is very clear. It's
13 just a simple proposition that a claimant has to see the process
14 through to completion, and that can happen a number of different
15 ways.

16 THE COURT: Now, the letter that the Department of State
17 issued was in September.

18 MS. YANG: Yes.

19 THE COURT: And at what point did claimant indicate that
20 they were pursuing a court -- pursuing filing a complaint in
21 Federal Court as opposed to proceeding with the administrative
22 process? Does that --

23 MS. YANG: I believe the notice of withdrawal that
24 plaintiff attached as one of his exhibits is dated early
25 September before the EEO's acceptance letter.

1 THE COURT: So they indicated that they were withdrawing
2 and filing in Federal Court before the letter?

3 MS. YANG: Correct.

4 THE COURT: Okay.

5 MS. YANG: But, of course, when we see the actual
6 complaint that was filed in Federal Court, there's no allegations
7 or claims included about Frankfurt in 2021 when plaintiff amended
8 his complaint last spring to add allegations about another
9 assignment. He again chose not to pursue the Frankfurt claims,
10 and he made that choice a third time in the fall when he told the
11 Court that he had no further amendments to make. We think that
12 under the law that we've cited in our papers and in which
13 plaintiff has not provided any contrary authority for, that this
14 is very clearly the epitome of failure to see a claim through to
15 completion, and that means that he has not fully and properly
16 exhausted his claims about Frankfurt in 2021.

17 I understand that plaintiff has made a number of arguments
18 in his opposition to try to get around this failure to exhaust,
19 and we addressed those fully in our reply brief. I'll be happy
20 to talk about them further if --

21 THE COURT: I want to go back to your position on the
22 failure to exhaust. They issued the letter that they were going
23 to withdraw prior to the acceptance letter coming from the
24 Department.

25 MS. YANG: I believe -- I believe that's correct. I

1 believe that's correct.

2 THE COURT: Ms. Yang, Mr. Suarez can find that answer.
3 You don't need to look for it. And I agree with you that they
4 did have opportunities to raise it here sooner, but now they
5 haven't. You did not -- the government did not seem to advance a
6 prejudice argument with regard to the second amended complaint in
7 your pleadings. Is that fair?

8 MS. YANG: It is true that we did negotiate a
9 {indiscernible} as to discovery, but we consented to the filing
10 of the complaint, although, of course, we didn't {indiscernible}
11 the exhaustion issue.

12 THE COURT: I understand your position.

13 MS. YANG: Thank you, Your Honor. I'll be happy to
14 address any further questions Your Honor might have or in
15 response to the argument that counsel makes.

16 I think the bottom line is that we think the issue begins
17 and ends with the simple question of whether plaintiff saw these
18 claims through to completion, and I don't think there can be any
19 reasonable dispute that by failing to ensure that they were
20 included in the EEO proceedings, by failing repeatedly to bring
21 them in this case at various opportunities when they had the
22 chance to bring them in the case, that our motion should be
23 granted in this case.

24 MR. SUAREZ: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. SUAREZ: So just a few points. First on the
2 exhaustion issue, as Your Honor pointed out, the only case they
3 cite from the Fourth Circuit is the *Austin* case. It was not a
4 precedential decision and is not on point. There is no Fourth
5 Circuit precedent that suggests that just because something is
6 not listed in the accepted allegations, that that somehow
7 vitiates exhaustion. So there's no legal authority, precedential
8 legal authority that they have a leg to stand on in terms of
9 their argument.

10 And so, as a threshold matter, our position is that the
11 motion to dismiss should be denied on that basis alone because,
12 as Your Honor also alluded to, two of our client's EEO
13 complaints, July 22nd and July 28th, referenced this retaliation/
14 discrimination issue with respect to the Frankfurt IMTS position
15 in 2021 in detail.

16 And to Your Honor's prior rulings, Your Honor ruled that
17 certain claims were not exhausted because things in Your Honor's
18 view were not recited in those complaints, EEO complaints
19 sufficiently. So here there's absolutely no dispute whatsoever
20 that this -- that these particular claims are exhausted. They
21 have not presented any arguments to the contrary.

22 The second issue which is very important is, even if there
23 were binding legal authority and you were to assume that there
24 was some abandonment argument or that it was never even in the
25 complaint at all, we cited the case law from the Fourth

1 Circuit -- precedential case law from the Fourth Circuit --
2 including the *Sydnor* case, the *Smith* case, the *Chisholm* case,
3 which all stand for the proposition that like or related
4 allegations that grow from the same factual circumstances, same
5 corpus of facts, are actionable, even if they're not recited in
6 the complaint at all. And here what we had was a position,
7 Frankfurt IMTS in 2021, which the timeframe is in May and June of
8 2021, and that was right before the *Krakow* decision, a denial in
9 July 2021. In that timeframe between 2019 and 2021 where
10 Mr. Lenzi was on this Overcomplement status, the State Department
11 at every turn was denying his overseas positions and overseas
12 bids, which Your Honor had an initial hearing, was grounds for a
13 discrimination and retaliation claims. And the proposition that
14 that case law stands for is that if an investigation would have
15 reasonably come up with this factual issue, that it can be
16 erased, and we submit that because this factual scenario of the
17 2021 IMTS position was close in time to the *Krakow* position and
18 then followed the same actors of the State Department, including
19 the Bureau of Diplomatic Security, because it's the Bureau that
20 continuously treated him in this manner and refused to give him
21 overseas assignments.

22 Just so Your Honor appreciates what happened in discovery,
23 this is a timeframe where they were directing him to a domestic
24 assignment. They were saying you have to go into a domestic
25 position, and so this is when Mr. Lenzi was trying to get more --

1 you know, apply for other overseas positions and the continued
2 denials that continued. And again smack dab in the middle,
3 *Sydnor* stands for the proposition when you have similar
4 timeframes, similar actors, similar claims. Again, it's the same
5 counts: Discrimination, retaliation. It's the same thing. A
6 lot of the cases they cite in their brief were these kinds of
7 cases where you have sex discrimination, and then you go to race,
8 you switch completely in those counts, and that's not what we're
9 doing here at all. It's a factual issue that is within the same
10 discrimination or retaliation act advanced beyond the pleading
11 stage before.

12 And we note that -- in the *Smith* case, it's particularly
13 on point because in that case there were grounds of retaliation
14 that were not listed in the complaint that changed -- that
15 changed during the pleading stage, and the Fourth Circuit said
16 we're going to let those advance because they are related. And
17 that's what we have here. At the end of the day, Your Honor,
18 this is about fundamental fairness. This was an issue that came
19 up during discovery that they produced documents about that --

20 THE COURT: But you say that in your pleading that these
21 are new facts, but they're not new facts. I mean, your client
22 filed an EEO complaint based on them. So it's not new facts.
23 You didn't find out about that because of their discovery or
24 because of the deposition; you were already aware. You just
25 didn't anticipate the legal theory that the government had.

1 MR. SUAREZ: And candidly, Your Honor, we didn't
2 appreciate the significance. In an ideal world -- and I just
3 want to clarify one point for the record as well. Their
4 representation was correct that the allegations of the first
5 complaint were withdrawn prior to us coming to Federal Court, but
6 we could not have brought this Frankfurt IMTS position, we could
7 not have brought this with the original complaint.

8 So, in hindsight, I would have brought it in the first
9 amended complaint, and I acknowledge that, Your Honor. But I
10 think Your Honor articulated very clearly that we did bring it,
11 and we brought it as soon as we appreciated the significance, and
12 opposing counsel consented to the amendment, and all the
13 prejudice factors were -- we discussed and handled during that
14 discussion. We conceded to several discovery concessions on the
15 {indiscernible} relating to this issue to allay any prejudice
16 concerns.

17 And so our view is that if they really felt this was a
18 futile amendment, they could have opposed, you know, the
19 amendment itself with a futility basis. But our view is, because
20 the law is so clear, that there is, you know, not a problem with
21 exhaustion on the threshold matter and because a reasonable
22 investigation would have come up with this.

23 In fact, I think the facts of the case bear that out.
24 It's because we did discovery, and we deposed witnesses, and we
25 asked that question, that, you know, these documents came to

1 light. You're right that we in hindsight should have appreciated
2 that sooner, but if you think from the perspective of an EEO
3 investigator, they would have done the investigation, they would
4 have focused on more witnesses, they would have considered all of
5 that, and therefore it wouldn't have been the same investigation.

6 And one other point I want to make, Your Honor, that's
7 significant is that we cite all of these cases, again, Fourth
8 Circuit binding cases: *Sydnor*, *Smith*, *Chisholm*, and explain them
9 in excruciating detail and also distinguish all of the cases.

10 And if you look at the government's brief where they
11 address this reasonably related issue like they're related,
12 there's a paragraph on page 5 of their brief, and in that
13 paragraph they cite no affirmative case law to support their
14 position, they don't rebut any of the Fourth Circuit authority
15 that we cited, including again *Stewart*, *Sydnor*, *Chisholm*, all of
16 those cases. And so not only do they not present any affirmative
17 authority, they also do not rebut any of our Fourth Circuit
18 authority which dictates that, you know, the interest of justice
19 should permit this claim to proceed.

20 Again, in hindsight, we would have asserted it sooner, but
21 given the posture we're in here, there's no 12(b)(6) issue in
22 terms of the merits; there's no issue in terms of exhaustion; and
23 because this is smack dab in the center of all these issues that
24 occurred in 2019 and 2021, we believe that this should be
25 permitted to go to trial so we can tell the complete story, and

1 the government should not -- certainly should not be permitted
2 to, you know, as we noted in the Kaleczyc deposition, he tried to
3 suggest that, Oh, this is something that they offered that was
4 overseas. But, again, they didn't follow through. They found
5 another reason to deny him. So we think this is an important
6 part of the trial story, in hindsight we should have mentioned it
7 sooner, but --

8 THE COURT: But wouldn't you still have the opportunity to
9 counter the government's evidence with respect to that through
10 cross-examination and the questions you will ask?

11 MR. SUAREZ: We certainly still do, but we do not think
12 that they have any legal leg to stand on in terms of this claim
13 or with this aspect of the claim going forward, because it is,
14 again, part of the corpus of factual allegations linked to this
15 ongoing effort by the State Department to keep Mr. Lenzi in
16 Overcomplement status, keep him in domestic positions, refuse to
17 give him the opportunity to advance his career, as we have
18 alleged and as Your Honor agreed was permitted to proceed.

19 So, unless Your Honor has further questions, for those
20 reasons we believe the motion should be denied.

21 THE COURT: Okay. Ms. Yang.

22 MS. YANG: Thank you, Your Honor. I do have a couple of
23 brief points in response. The first is that counsel criticizes
24 the *Austin* decision that we were relying on which is the one that
25 the plaintiff has to see the process through to completion.

1 That's been unpublished. Certainly it's true it's been
2 unpublished, but I think it's still Fourth Circuit authority and
3 the Fourth Circuit has followed it. Among those cases which we
4 cite in our papers is the *Clark* case from the Eighteenth
5 District, and the facts of that case, although not identical, are
6 quite similar with the case in which the plaintiff took an
7 administrative appeal of certain of the claims that he had
8 brought initially, but did not go through on certain other
9 claims, and the district court held that the claims that he had
10 not continued to pursue were not exhausted and therefore were
11 dismissed from the case.

12 Counsel just now referred repeatedly to how the 2021
13 Frankfurt assignment is part of the corpus of their story, and we
14 think that fundamentally misunderstands the exhaustion
15 requirement for disparate treatment claims, which is a theory of
16 a claim that plaintiff has pled in the case, disparate treatment
17 claims require disparate acts and disparate acts that have been
18 independently exhausted. A plaintiff can't just come in and say
19 there's this umbrella of discrimination and retaliation, and
20 anything that I say is discriminatory or retaliatory, and that's
21 just not how it works for these kinds of claims.

22 Counsel also made an earlier argument that the 2021
23 Frankfurt assignment allegations are like or relate to the things
24 that were exhausted and therefore they should come in that way.
25 Again, as we demonstrated in our reply brief, the later argument

1 that came in that they cited, the *Sydnor* case, the *Smith* case,
2 the *Chisholm* case that counsel just referenced, that's a
3 different standard that deals with a different issue. It deals
4 with the first issue that I described to Your Honor in my
5 opening, which is has the piece -- has the plaintiff brought the
6 claims at all, did they make it part of the administrative claim
7 at all?

8 Again, we're not dealing with that issue here, we're
9 dealing with a separate issue of did the claimant see the claims
10 that they brought through to completion in the administrative
11 proceedings. And again, there's a completely different --

12 THE COURT: And your basis for saying they didn't see it
13 through is their failure to correct the letter?

14 MS. YANG: The failure to -- well, the actions that they
15 took to demonstrate that they did not intend to pursue the claim
16 through the administrative proceedings, which include not just
17 failing to make sure that it's included in the letter, but making
18 corrections to other -- demonstrating the intent to correct and
19 make sure that those claims were properly framed for the
20 administrative proceedings, but then not doing so with respect to
21 the claims that are at issue here. I'm -- plaintiff's counsel
22 says that we don't cite any affirmative --

23 THE COURT: Here's my issue with that. I understand and
24 appreciate that the plaintiff failed to correct, but it is
25 clearly stated in the -- I mean, that was the whole focus of the

1 July 22nd complaint, and so the failure for -- and plaintiff did
2 not correct it. I hear you on that, but the agency failed to
3 include it. I mean, that was the whole complaint on July 22nd,
4 you know, the 12-pages with e-mails included and all of that, and
5 it just wasn't referenced. I think they just spoke -- I think it
6 was a mistake that they didn't focus also on the -- it seemed
7 like they only focused on the July 28th complaint, even though
8 they included the date for the July 22nd complaint, but there was
9 also a failure on the agency's part. I acknowledge and
10 appreciate your arguments in terms of plaintiff's failure to
11 correct it, but I have an issue with that, because to me there's
12 no reasonable justification for it not to have been included when
13 that was the whole basis of the July 22nd letter.

14 MS. YANG: I appreciate Your Honor's concern, and I don't
15 know why it wasn't included. I don't know if it was because
16 there was a determination that those things weren't timely.
17 There could be any number of reasons why that was not included in
18 the record, including what's not part of the record as to why
19 they weren't, but certainly the undisputed --

20 THE COURT: And I understand your position, and you're
21 not -- you can't really defend that, and I'm not asking you to,
22 but I'm letting you know what my concern is.

23 MS. YANG: Right.

24 THE COURT: And I see and I appreciate the cases that you
25 have cited, but none of them are binding on me, and that is where

1 my concern is, the fact that it was clearly identified in that
2 letter.

3 MS. YANG: I understand, Your Honor. Again, I do think
4 that the District Court decision from EDVA that we cited in our
5 papers does go to the issue, again not necessarily the second
6 claim issue, but certainly the issue that --

7 THE COURT: And I've looked at the cases, and I definitely
8 have considered that, as well as the *Alston* case and, you know,
9 your authority, the Judge Cacheris case, but still that is my
10 issue, and those cases don't have these facts.

11 MS. YANG: I understand Your Honor's concern.

12 THE COURT: And I read your cases from, you know, other
13 courts where they have looked at acceptance letters and found
14 that the plaintiff's failure to correct those letters constituted
15 a failure to exhaust. I'm just saying I don't agree with that.

16 MS. YANG: I understand, Your Honor. The final point I
17 would just end on, though, is that, you know, the -- what really
18 does distinguish this case from any other case I've seen dealing
19 with exhaustion issues is that the abandonment in this case
20 really is far more pronounced than the {indiscernible} --

21 THE COURT REPORTER: I'm sorry, counsel, I can't hear you.

22 MS. YANG: Is more pronounced because of the multiple
23 opportunities to bring the Frankfurt claims in this case.
24 Plaintiff's counsel says it was an oversight, we didn't mean to
25 not include them, but, respectfully, Your Honor, that's not --

1 that's not an excuse for exhaustion. The exhaustion requirements
2 are there for a reason. They had the opportunity to do so. They
3 had three opportunities to do so well after they became aware of
4 the facts and the allegations, and the timeliness requirements to
5 correct them in this case. So, for these reasons and those we
6 argued, we ask that the motion be granted.

7 THE COURT: Thank you.

8 MS. YANG: Thank you.

9 THE COURT: The first issue I'm going to take up is the
10 plaintiff's repleading portions of the case that I've already
11 dismissed. Stop doing that. Your exceptions have been
12 preserved, so don't keep including them in the complaint. Even
13 if you can, don't.

14 The government's motion is granted with respect to that
15 request. Those claims have already been dismissed with
16 prejudice. Okay. Next, in terms of the 2021 Frankfurt IMTS,
17 those allegations which have now been included in the complaint,
18 this is the first time the Court is seeing those allegations.
19 And I understand your argument with respect to, you know, the
20 discrimination and retaliation claims that have been exhausted,
21 and those are properly before the Court, and it includes these
22 allegations with respect to the 2021 Frankfurt position, but
23 allegations with respect to the position have not been included
24 and before the Court before, and the government's arguments with
25 regard to, you know, like -- I understand your argument with

1 respect to witness in time for your first complaint, but, you
2 know, it should have been in your first amended complaint are.
3 And these aren't new facts, but for me that is really more
4 related to a prejudice argument and not for an exhaustion with
5 respect to plaintiff's failure to correct the acceptance letter.
6 I understand the government's argument and the cases that you
7 have cited with respect to exhaustion, but, as I said before,
8 none of those are binding on the Court, and the acceptance letter
9 is not a statutorily required procedure, and in this case
10 plaintiff's EEO -- that July 22nd complaint, the whole focus of
11 it was the 2021 Frankfurt or those allegations.

12 And I think that, you know, there is some blame with the
13 agency and the reasonable -- the reason that those should have
14 been -- that that should have been excluded in the acceptance
15 letter, and plaintiff was advised in the letter to correct it and
16 did correct a portion dealing with *Krakow*. I don't know why the
17 plaintiff didn't correct or add in the Frankfurt claim for that
18 point, but I also don't know why the agency didn't include it
19 either, and I'm not going to find that plaintiff failed to bring
20 the claim -- or failed to exhaust the claim when they adequately
21 advised the agency of the claim. This may be a different
22 position if the administrative process had proceeded more or
23 plaintiff had done more affirmative steps to abandon the claim at
24 the agency level, but that's not before me. Those aren't the
25 facts in this case. And you've also correctly noted that they

1 didn't raise it at the first opportunity with that first amended
2 complaint, but you agreed that they could -- or you agreed that
3 the amendment provided that you could raise this argument or
4 motion to dismiss on the exhaustion ground, but I'm not
5 particularly persuaded by the exhaustion argument at the agency
6 level. They didn't raise it initially in court before, but they
7 have raised it now, and I'm going to permit that. I'm not going
8 to grant your motion to dismiss. I'm going to deny it for the
9 reasons that I stated, because I don't believe that that process
10 of correcting or the letter is statutorily required.

11 The plaintiff fully put the agency on notice about those
12 allegations, and to me there's no reason why it was not included
13 in that acceptance letter, and also given, the timing of it, that
14 that was also around the time that they were making the decision
15 to proceed to Federal Court, and so for those reasons I'm denying
16 your motion.

17 Now, have you all worked out what discovery will be with
18 respect to these claims or these allegations?

19 MS. YANG: Yes, Your Honor. Fact discovery is closed at
20 this point.

21 THE COURT: But have you all worked out whatever was
22 needed?

23 MR. SUAREZ: Yes, we have.

24 THE COURT: Thank you.

25 MS. YANG: Thank you.

1 THE COURT: Your exceptions are preserved. We're
2 adjourned.

3 (Proceedings adjourned at 10:59 a.m.)

4 **C E R T I F I C A T E**

5
6 I, Scott L. Wallace, RDR-CRR, certify that
7 the foregoing is a correct transcript from the record of
8 proceedings in the above-entitled matter.

9 /s/ Scott L. Wallace

1/10/22

10 **Scott L. Wallace, RDR, CRR**
11 **Official Court Reporter**

12 **Date**